THE HON'BLE SRI JUSTICE B.SUDERSHAN REDDY

AND

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

W.P.NO.3661 OF 2005

Dated: 08.08.2005

Between:

M/s Karvy Consultants Limited, Karvy House, 46, Avenue 4, Street No.1, Banjara Hills, Hyderabad –500 034.

… Petitioner

and

Assistant Commissioner of Customs & Central Excise, Hyderabad-II and another.

… Respondents.

THE HON'BLE SRI JUSTICE B.SUDERSHAN REDDY

AND

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

W.P.NO.3661 OF 2005

ORDER:

In this writ petition the petitioner seeks a declaration that Section 65(90) read with 65(11) of the Finance Act, 2001 has no application to the petitioner company upto 16.08.2002 and to consequently interdict the Assistant Commissioner of Customs

and Central Excise, Hyderabad–II Commissionerate (1st respondent) from proceeding further with the show cause notice HQOR/32/2004-AE-II, dated 27.12.2004.

The facts, to the extent necessary for the purpose of this writ petition, are that the 1st respondent, vide proceedings dated 27.12.2004, called upon the petitioner to show cause as to why:-

i. An amount of Rs.28,70,494/- should not be paid by them towards Service Tax on the amounts received by them during the period from 16.07.2001 to 15.08.2002, on account of providing taxable services under proviso to Sec 73(1) of the Finance Act, 1994.

ii. Interest should not be paid by them on the amount demanded at (i) above under Sec 75 of the Finance Act, 1994.

iii. A penalty should not be imposed on them under Sec 76 of the Finance Act, 1994.

iv. A penalty should not be imposed on them under Sec 77 of the Finance Act, 1994.

v. A penalty should not be imposed on them under Sec 78 of the Finance Act, 1994.

The petitioner was asked to produce all the evidence upon which they intended to rely in their defence as also to indicate in their written reply whether they wished to be heard in person before the case was adjudicated.

The petitioner, a company registered under the Companies Act, was earlier, in the course of its business, carrying on depository participant services, Registrar and transferring agency etc. It is the case of the petitioner that during the year 1996 it had accepted deposits and advanced loans and was therefore required to take a licence as a non-banking financial Company under Section 45 of the Reserve Bank of India Act. During the year 1997, the petitioner is said to have resolved to give up the said activity and consequent thereto the deposits which were accepted for specified periods are said to have been refunded to the depositors on maturity. Petitioner contends that during the financial year 2001-2002, it neither carried on any non-banking financial activity nor did it receive any deposits as its principal business,

that it did not fall within the purview of a non-banking financial company and therefore could not be classified as such within the meaning of Section 45-I(f) of the Reserve Bank of India, 1934, and as a result it was not required to return any part of its turnover to service tax for the relevant financial year.

Section 65(90) of Finance Act, 2001 defines “Taxable service” to mean:-

“any service provided to a customer by a banking company or a financial institution including a non-banking financial company, in relation to banking and other financial services”.

Sub-clause (zm) of Section 65 (90) as it stood during the period from 16.08.2002 to 10.09.2004 read thus:-

“to a customer, by a banking company or a financial institution including a non-banking financial company, in relation to banking and other financial services”.

The petitioner contends that it is only with effect from 16.08.2002 that similar service rendered to a customer by a body corporate was brought within the purview of service tax and that, with effect from 10.09.2004, the service referred to in sub-clause(zp) of Section 65 (90) was incorporated into sub-clause (zm) of Section 65 (90) and sub-clause (zp) was omitted by Finance Act of 2004 with effect from 10.09.2004.

Sub-clause(zp) as incorporated by Finance Act, 2002 with effect from 16.08.2002 and sub-clause (zm) as amended by Finance Act, 2004 with effect from 10.09.2004 read thus:

(zp)

“to a customer, by a body corporate other than the body corporate referred to in sub-clause (zm), in relation to banking and other financial services.”

(zm)

“to a customer, by a banking company or a financial institution including a non-banking financial company, or any other body corporate or commercial concern, in relation to banking and other financial services.”

The petitioner contends that since the services rendered by a body corporate to a

customer was brought within the purview of Service tax, the petitioner was required to and was filing returns offering the turnover of financial services under sub-clause (zp) of Section 65 (90) with effect from 16.08.2002 and under sub-clause (zm) of Section 65 (90) with effect from 10.09.2004 and was paying service tax accordingly.

As referred to above taxable service, during the relevant period, was defined to mean any service including any service, provided to a customer by a non-banking financial company, in relation to banking and other financial services. Section 65(11) of Finance Act 2001 defined “banking and other financial service” to mean:-

a. the following services provided by a banking company or a financial institution including a non-banking financial company namely:-

i. financial leasing services including equipment leasing and hire-purchase by a body corporate;

ii. credit card services;

iii. merchant banking services;

iv. securities and foreign exchange (forex) broking;

v. asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services, but does not include cash; management;

vi. advisory and other auxiliary financial service; including investment and portfolio research and advice, advice on mergers and acquisitions and advice on corporate restructuring and strategy; and

vii. provision and transfer of information and date processing.

Section 65(73) of the Finance Act, 2001 defined the expression “non-banking financial company” to have the same meaning assigned to it in clause (f) of Section 45(I) of the Reserve Bank of India Act. The expression “non-banking financial Company” as defined under Section 45-I (f) of the Reserve Bank of India Act, 1934 is as under:

"Non-banking financial company means:

i. a financial institution which is a company;

ii. a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner;

iii. such other non-banking institution or class of such institutions, as the Bank may, with the previous approval of the Central Government and by notification in the Official Gazette, specify."

On a conjoint reading, of Section 45-I(f) of the Reserve Bank of India Act read with Section 65(73), 65(11), and Section 65(90) (zm) as they stood prior to amendment by the Finance Act, 2004, it was only a non-banking financial company which had as its principal business the receiving of deposits, under any scheme or arrangement or lending in any other manner, which could be said to be providing taxable service rendering it liable for payment service tax.

It is not in dispute that the petitioner did not fall within clauses (i) and (iii) of Section 45-I (f) of the Reserve Bank of India Act, 1934. It is the case of the 2nd respondent, in its counter-affidavit, that the petitioner obtained a licence as a non-banking financial Company (NBFC) under Section 45 of the Reserve Bank of India Act, with certificate of registration No0900241, dated 14.12.1998 to carry on the business of a non-banking financial institution, that the certificate of registration clearly indicates that the petitioner is taking deposits and that the said certificate of registration was not revoked during the period from 16.07.2001 to 15.08.2002. It is further contended that, by virtue of the said certificate of registration, the status of the petitioner continued to be that of a non-banking financial company, that the petitioner was therefore covered under clause (ii) of Section 45-I (f) of the Reserve Bank of India Act, 1934 and while the petitioner started paying service tax with effect from 15.8.2002 they were required to pay service tax with effect from 16.07.2001, inasmuch as the certificate of registration to carry on the business of a non-banking financial company was valid and in force during the period 16.07.2001 to 15.08.2002. It is also stated in the counter-affidavit that service tax was payable on depository charges received by the petitioner from 16.07.2001 to 15.08.2001, that non-payment of service tax attracts penalty and accordingly imposition of penalty was proposed in the show cause notice, that irrespective of whether or not the

petitioner had accepted deposits during the relevant period, they were required to be classified under clause (ii) of Section 45-I (f) of the Reserve Bank of India, 1934 as the certificate of registration was not revoked during the said period. It is also contended that the petitioner is covered by the definition of “banking and other financial services” under Section 65 of the Finance Act, 1994 as amended by the Finance Act 2001, in view of it being granted the certificate of registration under Section 45-I(f) of the Reserve Bank of India Act. Respondents contend that the petitioner has approached this Court without exhausting the alternative remedies available under the Act, and that the writ petition as filed is pre-matured.

It is only on the basis that the petitioner was issued a certificate of registration, by the Reserve Bank of India, as a non-banking financial company which certificate was valid during the period from 16.07.2001 to 15.08.2002, the respondents contend that the petitioner falls within the definition of a “non-banking financial company” under Section 45-I(f)(ii) of the Reserve Bank of India Act, 1934, whereunder a non-banking financial Company has been defined to mean a non-banking institution which is a Company and has as its principal business, the receiving of deposits under any scheme or arrangement or in any other manner, or lending in any manner. Clause (ii) of Section 45-I (f) of the Reserve Bank of India Act prescribes two conditions. Firstly, the non-banking institution is required to be a company. Secondly, the said company is required to have as its principal business receipt of deposits or lending. It is only if both the conditions, and not one alone, are satisfied would the definition of “non-banking financial company” be attracted. While the petitioner is a Company and in view of its certificate of registration is also a non-banking institution that, by itself, would not bring it within the definition of a “non-banking financial Company” under Section 65(73) of the Finance Act read with Section 45-I(f)(ii) of the Reserve Bank of India Act. It is only if, in addition thereto, it is established that the petitioner has, as its principal business, receiving of deposits or lending that it would fall within the definition of a non-banking financial Company.

Sri S.R. Ashok, learned Senior Counsel appearing on behalf of the petitioner, in support of his contention that the provisions of a taxing statute are to be strictly and literally construed, places reliance on the judgment of the Supreme Court in Commissioner of Sales Tax, U.P. Vs. Modi Sugar Mills Limited (12 STC 182), where

in it was held thus:

"……..In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The Court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything, which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency……."

Learned Senior Counsel, on referring to the averments in the counter-affidavit, submits that the sole basis for the 2nd respondent to hold that the petitioner is a non-banking financial company is only the certificate of registration issued in its favour by the Reserve Bank of India and for no other reason. He also submits that there is no denial in the said counter-affidavit, of the petitioner's assertion that it did not accept deposits or lend any amount during the period from 16.07.2001 to 15.08.2002.

We agree with the submission of the learned Senior Counsel that the certificate of registration by itself would not bring the petitioner within the definition of a "non-banking financial company" inasmuch as Section 45-I(f)(ii) requires in addition thereto, the company to carry on, as its principal business, receipt of deposits or lending of money. While it is true that the counter-affidavit is silent as to whether or not the petitioner's principal business, during the said period 16.07.2001 to 15.08.2002, was receipt of deposits or lending of money, the impugned show cause notice dated 27.12.2004, however states that intelligence, gathered by the Commissionerate of Customs and Central Excise, indicated that the petitioner was providing services as a Depository participant, that a scrutiny of the records and details submitted by the petitioner revealed that they had obtained a non-banking financial certificate issued by the Reserve Bank of India as deposit taking company on 14.12.1998, that the total amount collected by the petitioner as depository participant worked out to Rs.5,74,09,882/- during the period 16.07.2001 to 15.08.2002, and that the service tax payable thereon amounted to Rs.28,70,494/-

Though the counter-affidavit places reliance solely on the certificate of registration issued to the petitioner by the Reserve Bank of India as a "non-banking financial company", the show cause notice dated 27.12.2004 indicates that the petitioners were providing services as a depository participant. Whether or not, during the relevant period 16.07.2001 to 15.08.2002, the petitioner, as its principal

business, was receiving deposits or lending money, are matters which are required to be examined by the 2nd respondent on the basis of information gathered by it and made available to the petitioner as also the explanation and material furnished, in reply to the show cause notice, by the petitioner. Suffice to state that the petitioner cannot be held to be a “non-banking financial company” solely on the basis of the certificate of registration issued by the Reserve Bank of India. It is only if, on the basis of material on record, it is established that in addition to the Certificate of Registration, the principal business of the petitioner, during the relevant period, was receipt of deposits or lending of money, that it would come within the definition of a “non-banking financial company”, rendering it liable for payment of service tax.

Since the period of fifteen days stipulated in the show cause notice has already expired, we deem it appropriate to permit the petitioner, if it so chooses, to file an additional reply to the show cause notice dated 27.12.2004 within fifteen days from the date of receipt of a copy of this order. If any such reply is submitted by the petitioner within this period, the 2nd respondent shall, taking into account what has been stated above and on considering all the objections raised by the petitioner, in reply to the show cause notice dated 27.12.2004, pass appropriate orders thereon, in accordance with law.

Writ petition is accordingly disposed of. No order as to costs.

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B.SUDERSHAN REDDY, J

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RAMESH RANGANATHAN, J

Date: .08.2005

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